Assessing the New U.S. “View” on the Legality of Israeli Settlements in the West Bank

by Marty Lederman

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In his remarks to the press yesterday, Secretary of State Mike Pompeo said the following with respect to the settlement of Israeli civilians in the West Bank. I’ve highlighted three sentences in particular that I’ll discuss later in this post:

U.S. public statements on settlement activities in the West Bank have been inconsistent over decades. In 1978, the Carter administration categorically concluded that Israel's establishment of civilian settlements was inconsistent with international law. However, in 1981, President Reagan disagreed with that conclusion and stated that he didn't believe that the settlements were inherently illegal.

Subsequent administrations recognized that unrestrained settlement activity could be an obstacle to peace, but they wisely and prudently recognized that dwelling on legal positions didn't advance peace. However, in December 2016, at the very end of the previous administration, Secretary Kerry changed decades of this careful, bipartisan approach by publicly reaffirming the supposed illegality of settlements.

After carefully studying all sides of the legal debate, this administration agrees with President Reagan. **The establishment of Israeli civilian settlements in the West Bank is not per se inconsistent with international law.**

I want to emphasize several important considerations.

First, look, we recognize that – as Israeli courts have – **the legal conclusions relating to individual settlements must depend on an assessment of specific facts and circumstances on the ground**. Therefore, the United States Government is expressing no view on the legal status of any individual settlement.

The Israeli legal system affords an opportunity to challenge settlement activity and assess humanitarian considerations connected to it. Israeli courts have confirmed the legality of certain settlement activities and has concluded that others cannot be legally sustained.

Second, we are not addressing or prejudging the ultimate status of the West Bank. This is for the Israelis and the Palestinians to negotiate. International law does not compel a particular outcome, nor create any legal obstacle to a negotiated resolution.

Third, the conclusion that we will no longer recognize Israeli settlements as per se inconsistent with international law is based on the unique facts, history, and circumstances presented by the establishment of civilian settlements in the West

> Bank. Our decision today does not prejudice or decide legal conclusions regarding situations in any other parts of the world.
>
> And finally – finally – calling the establishment of civilian settlements inconsistent with international law hasn't worked. It hasn't advanced the cause of peace.
>
> The hard truth is there will never be a judicial resolution to the conflict, and arguments about who is right and wrong as a matter of international law will not bring peace. This is a complex political problem that can only be solved by negotiations between the Israelis and the Palestinians.
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It's important to note at the outset that Secretary Pompeo is right about a couple of things.

First, it's true that although the United States has consistently condemned the settlements ever since 1967, between 1981 and 2016 the Executive branch did not "dwell[] on" the legal question: Administrations of both parties mostly avoided saying anything at all about the ultimate legality of the settlements—although, as I explain below, administrations of both parties *did* vote for United Nations Resolutions that rejected the principal Israeli argument for why the settlements do not violate the Fourth Geneva Convention (i.e., that Article 49(6) of the Fourth Geneva Convention does not govern the West Bank at all).

Second, Pompeo is correct that the answer to the international law question "does not compel a particular outcome" in negotiations between the Israelis and the Palestinians, "nor create any legal obstacle to a negotiated resolution." Nor did the Obama Administration think otherwise: Secretary of State John Kerry explained in 2016, for example, that although U.N. Security Council Resolution 2334 (on which the United States abstained) condemned Israeli transfers of civilians to East Jerusalem as a violation of international law, that "in no manner prejudges the outcome of permanent status negotiations on East Jerusalem, which must, of course, reflect those historic ties and the realities on the ground."

In other respects, however, Secretary Pompeo's remarks about the legal question are mistaken or misleading.

The Legal Question and the Consensus International View of Its Answer

Article 49(6) of the Fourth Geneva Convention (GCIV) provides that "[t]he Occupying Power shall not . . . transfer parts of its own civilian population into the territory it occupies."

As Secretary Kerry acknowledged in 2016, "for a long time the overwhelming consensus and international view" has been that the civilian settlements in the territory Israel has occupied since 1967 violate Article 49(6), at least to the extent the Israeli government authorizes, organizes, facilitates, or subsidizes them.

Israel's Counterarguments

The government of Israel has long contended, on the other hand, that its civilians' settlements in the West Bank and East Jerusalem do *not* place Israel in breach of Article 49(6). It principally defends that conclusion with two different arguments—**first**, that Article 49(6) doesn't apply to the Israeli occupation of the West Bank at all; and **second**, that even where Article 49(6) applies, it doesn't prohibit a state from transferring civilians to such occupied territory if the civilians *voluntarily* agree to the transfer (which of course describes the Israeli settlers in the West Bank)–in other words, that Article 49(6) prohibits only *forcible* transfers. (For what it's worth, the Israeli judiciary has not endorsed or accepted these arguments–it has, thus far, successfully avoided engagement on the Article 49 question.*)

A very small minority of scholars has occasionally endorsed one or both of those two arguments. See, e.g., Eugene Rostow's 1990 letter to the editor of the *American Journal of International Law*, 84 AJIL 717, 719 (1990). Nevertheless, the majority of scholars have rejected the arguments, as have virtually all other nations and the U.N. Security Council–sometimes with the assent of the United States. (To be clear: I haven't comprehensively studied the merits of the various arguments myself. The principal function of this post is to present the consensus international positions and to describe the United States's views on the question since 1967, in order to put Secretary Pompeo's announcement in its proper context.)

1. The Argument that Article 49 does not apply to the West Bank

First, Israel argues that the GCIV articles on *post-bellum* "occupation," including Article 49, apply *only* to "cases of partial or total occupation of the territory of a High Contracting Party" (Art. 2(2)), which, according to this argument, does not include the West Bank because no state party had sovereignty over that territory when Israel seized it in 1967.

It's worth noting at the outset that this argument is almost certainly inconsistent with the view Israel's government itself has traditionally propounded that certain of its *military* operations in the West Bank are authorized actions of a belligerent occupier—a view the Israeli Supreme Court has affirmed. (Iain Scobbie cites some of the cases here. See also Theodore Meron's famous 1967 memorandum when he was Legal Adviser to the Israeli Ministry of Foreign Affairs, in which he noted that "[i]n truth, even certain actions by Israel are inconsistent with the claim that the [West] Bank is not occupied territory.") As Yael Ronen and Yuval Shany explained on *Just Security*, this first argument would, if accepted, "cast doubt . . . on the consistent jurisprudence of the Israeli Supreme Court, which has held that the West Bank is subject to belligerent occupation (including in cases dealing with the impermissibility of taking private land for settlements), and on the legal basis invoked by Israeli military authorities in the West Bank themselves for countless security measures they have taken (including seizure of property for military needs and administrative detention)."

Whether and to what extent Israel's views with respect to the applicability of the relevant provisions of GCIV are internally consistent, however, the more important point is that almost no one else agrees that the "Article 49 doesn't apply to the West Bank" argument is correct as matter of interpreting GCIV.

As Eyal Benvenisti explains in The International Law of Occupation (p.207), outside Israel the argument that GCIV doesn't apply to the West Bank "has been widely and vehemently criticized by the United Nations, the ICRC, states, and scholars" (citing, *inter alia*, Yoram Dinstein). Israeli scholar David Kretzmer likewise refers to it as an "old, tired and universally rejected" argument. All 15 Commissioners of the International Court of Justice expressly rejected the argument in their 2004 Wall opinion (see paragraphs 90-101, pages 173-77, and paragraph 2 of Judge Buergenthal's dissenting opinion, concurring on this point). And in their 2001 Convention, the participating High

Contracting Parties to the Fourth Geneva Convention themselves "reaffirm[ed] the applicability of the Convention to the Occupied Palestinian Territory, including East Jerusalem[,] and reiterate[d] the need for full respect for the provisions of the said Convention in that Territory," including by "the State of Israel as the Occupying Power."

Of even greater pertinence for present purposes, the U.N. Security Council has also repeatedly rejected Israel's inapplicability argument. In numerous resolutions—including some approved by the United States, in Republican and Democratic Administrations alike—the UNSC has expressly resolved that GCIV applies to Israel's occupation of the West Bank territories and East Jerusalem.

In 1969, for instance, in Resolution 267, the unanimous Security Council "[c]ensure[d] in the strongest terms all measures taken to change the status of the City of Jerusalem," and "comfirm[ed]" that "all legislative and administrative measures and actions taken by Israel which purport to alter the status of Jerusalem, including expropriation of land and properties thereon, **are invalid** and cannot change that status." Resolution 298, which the United States also voted to approve, "confirm[ed]" that Israel's transfer of population to Jerusalem "aimed at" incorporation of the city was **"totally invalid."** In the 1980 Resolution 465, the Council determined, again unanimously, that "Israel's policy and practices of settling parts of its population and new immigrants" in "the Palestinian and other Arab territories occupied since 1967, including Jerusalem, or any part thereof," "**have no legal validity" and constitute "a flagrant violation of [GCIV]**."

In 1988 (i.e., during the Reagan Administration), the U.S. voted in favor of Resolution 607, which unanimously "reaffirm[ed] once again that **[GCIV] is applicable** to Palestinian and other Arab territories occupied by Israel since 1967, including Jerusalem." In 1990 (during the George H.W. Bush Administration), the Council unanimously approved Resolution 681, which urged the Israeli Government "to accept the *de jure* applicability of [GCIV] to all the territories occupied by Israel since 1967" (which it specifically defined to "include[] Jerusalem"). The next year, Resolution 694, also approved unanimously, declared that Israel's deportation of four Palestinians violated GCIV, "which is applicable to all the Palestinian territories occupied by Israel since 1967, including Jerusalem." Also in the first Bush Administration, the United States voted in favor of Security Council Resolutions 726 and 799, both of which condemned Israel for violating GCIV, and reaffirmed that that Convention applies "to all the Palestinian

territories occupied by Israel since 1967, including Jerusalem." In the Clinton Administration, the United States likewise voted in favor of Resolution 904, which reaffirmed the application of GCIV to Jerusalem.

In addition, between 1968 and 1989, the United States abstained on (i.e., did not veto) many other, analogous Security Council resolutions that reaffirmed the applicability of GCIV to the West Bank and Jerusalem, including Resolutions 252 (Johnson Administration), 271 (Nixon Administration), 446 (which called on Israel to desist from taking actions to "materially affect[] the demographic composition of the Arab territories occupied since 1967, including Jerusalem"—actions that included the "transfer [of] parts of its own civilian population into the occupied Arab territories"), 452, 471, 476, 478 (Carter Administration), 592, 605 (Reagan Administration), 636, and 641 (Bush 41 Administration).

2. The Argument that Article 49(2) doesn't prohibit *voluntary* transfers of civilians to occupied territory.

Israel's second principal argument is that even if Article 49(6) applies to the West Bank, it only prohibits *coercive* transfer of Israeli civilians to the territory. As Benvenisti explains, however (see p.240), this interpretation of Art. 49 is "doubtful" because the "purpose of the Article must be to protect the interests of the occupied population—the protected persons—rather than the population of the occupant, and therefore whether or not the settlers move freely to the occupied territory is beside the point." (Theodore Meron likewise explained in 1967 that the prohibition in Article 49(6) "is categorical and not conditional upon the motives for the transfer or its objectives." He thus concluded that "civilian settlement in the administered territories contravenes explicit provisions of the Fourth Geneva Convention." Meron has much more recently revisited and reconfirmed his 1967 views.)

I have not myself studied closely the merits of this second argument, but the Security Council has repeatedly rejected it in Resolutions—some joined by the United States, others passed with the U.S. abstaining—concluding that civilian settlements in the West Bank are unlawful. Resolution 446, for example (on which the U.S. abstained), called upon Israel, "as the occupying Power, to abide scrupulously by [GCIV]"; and invoking the very language of Article 49(6), it called upon Israel, "in particular, not to transfer parts of its own civilian population into the occupied Arab territories." The next year, in

Resolution 465, *approved* by the United States in 1980, the Security Council determined that "all measures taken by Israel to change the . . . demographic composition . . . of the Palestinian and other Arab territories occupied since 1967, including Jerusalem, or any part thereof have no legal validity and that **Israel's policy and practices of settling parts of its population and new immigrants in those territories constitute a flagrant violation of [GCIV]** and also constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East," and "call[ed] upon the Government and people of Israel . . . to dismantle the existing settlements and in particular to cease, on an urgent basis, the establishment, construction and planning of settlements in the Arab territories occupied since 1967, including Jerusalem."

Moreover, and as noted below, the United States' approval of Resolution 465 reflected the State Department Legal Adviser's considered view in 1978 that the settlements are, in fact, a violation of Article 49(6), whether or not the transfers are voluntary or involuntary —not a very radical position, as it was (and is) a view shared by virtually every state other than Israel.

The Official, and Public, Views of the United States . . . Until Yesterday

Contrary to Secretary Pompeo's assertion, U.S. public statements on the legality of settlement activities in the West Bank *have* been consistent ever since 1967—with the noteworthy exception, flagged by Pompeo, of one informal statement by President Reagan in the first fortnight of his presidency.

As noted above, the United States has repeatedly approved Security Council Resolutions, *in Democratic and Republican Administrations alike,* that rejected Israel's first argument that the GCIV articles on *post-bellum* "occupation," including Article 49, don't apply at all to the West Bank and East Jerusalem.

That consistent U.S. position was no accident, nor was it lightly adopted.

In 1976, in the Ford Administration, the U.S. Representative to the U.N., William Scranton, told the Security Council in no uncertain terms: "*Clearly* . . . substantial resettlement of the Israeli civilian population in occupied territories, including in East Jerusalem, is illegal under [Article 49 of] the Convention."

Then, in 1978, the State Department Legal Adviser, Herbert Hansell, concluded in a formal legal opinion that because the "paramount purposes" of GCIV are to protect the civilian population of an occupied territory and to reserve permanent territorial changes (if any) until settlement of the conflict, rather than to protect "the reversionary interest of an ousted sovereign," application of the Convention to the territories Israel occupied in 1967 does not depend upon whether Jordan or Egypt possessed sovereign rights before the Six-Day War.

The United States also publicly (either specifically or by implication) rejected Israel's *second* argument—that Article 49(6) doesn't prohibit "voluntary" transfers—in Scanton's 1976 remarks and then again in both 1980 and 2016. The latter rejections were based upon Legal Adviser Hansell's formal, published opinion in 1978, in which he concluded that although Israel may undertake actions in the occupied territories necessary to meet its military needs and to provide for orderly government during the occupation, "the establishment of civilian settlements in those territories is inconsistent with international law." (See also the State Department's Country Reports on Human Rights Practices for 1979 at page 761, reiterating this conclusion.)

Hansell explained in his opinion that the prohibition "appears to apply by its terms to any transfer by an occupying power if parts of its civilian population, whatever the objective and whether involuntary or voluntary"—and thus "seems clearly to reach such involvements of the occupying power as determining the location of settlements, making land available and financing of settlements, as well as other kinds of assistance and participation in their creation." "The language and history" of Article 49(6), Hansell wrote, "lead to the conclusion that transfers of a belligerent occupant's civilian population into occupied territory are broadly proscribed as beyond the scope of interim military administration."

To be sure, between 1981 and 2016, the United States deliberately avoided saying anything about the "voluntary transfer" question and, more broadly, did not make any public statements, one way or the other, about the ultimate question of the settlements' legality under Article 49(6), for fear that such statements would be unnecessarily provocative, and because of the firm belief of successive Presidents that the *future* status of the areas in question ought to be determined through negotiations, which will necessarily supersede and render inapposite any current legal status. During this period it was enough to say, as President Obama did in his 2009 Cairo speech, that "[t]he United

States does not accept the *legitimacy* of continued Israeli settlements," and that their "construction violates previous agreements and undermines efforts to achieve peace," without making any determinative statements about the *legality* of the settlements.

Internally, however, the Hansell opinion continued to reflect the official and considered legal position of the United States on the international law question . . . until yesterday. As National Security Council official Robert Malley confirmed in 2016, the U.S.'s position since 1978 (and before) had been that settlements are "inconsistent with international law," a conclusion that "has never been repudiated or changed internally." Likewise, Secretary Kerry declared in 2016 that "[w]e see no change since [1978] . . . to affect th[e] fundamental conclusion" in Hansell's opinion that "the Israeli Government's program of establishing civilian settlements in the occupied territory is inconsistent with international law."

What about President Reagan?

Secretary Pompeo is correct about this much: On one occasion in 1981, Reagan did say that he didn't think the settlements were illegal. In an interview with New York Times reporters two weeks after he entered office, President Reagan was asked whether he approved of Israel's "accelerated settling of the West Bank," and he responded, in part, that "as to the West Bank, . . . I disagreed when the previous Administration referred to them as illegal; they're not illegal . . . under the U.N. resolution that leaves the West Bank open to all people, Arab and Israeli alike, Christian alike."

It's not apparent to what "U.N. resolution" Reagan was referring. As far as I know there's no such resolution that contradicts the repeated conclusions of the Security Council that the civilian settlements are unlawful. I'm also not aware of any indication that Reagan was familiar with the formal Hansell opinion, that he or his lawyers had reconsidered the legal question, or that he had any basis at all for rejecting any of Hansell's conclusions, when he spoke to the *New York Times*. (And, as I note above, the U.S. thereafter repeatedly approved resolutions confirming application of GCIV to the occupied territories, including in the Reagan Administration.)

Accordingly, the Reagan statement became something of an embarrassment for U.S. officials, who for many years thereafter evaded answering any questions about the legality of settlements. "There is no point in getting caught up in legalities," said one official to the *Times* when asked about the legal question. "The settlements are an

obstacle to peace, and we have told the Israelis that we would like them not to build any more of them." An official confirmed to the *Times*, however, that the Hansell opinion had "never been repudiated, because none of the lawyers wants to write a paper saying the settlements are 'not illegal' because they know they will have too much trouble proving it."

That explains why Secretary Kerry and Robert Malley were able to confirm, in 2016, that the U.S.'s actual legal view since 1978 had been that Hansell was right: the West Bank settlements are "inconsistent with international law."

Yesterday's Unexplained—and Unconvincing—Shift of Position

Yesterday, Secretary of State Pompeo announced that "this administration," after "carefully studying all sides of the legal debate," has concluded that "[t]he establishment of Israeli civilian settlements in the West Bank is not *per se* inconsistent with international law," and that the "the legal conclusions relating to individual settlements" therefore "must depend on an assessment of specific facts and circumstances on the ground." (He emphasized that "the United States Government is expressing no view on the legal status of any individual settlement.")

This context-dependent, "it depends upon all the specific facts and circumstances" conclusion is, indeed, a repudiation of the official United States view of the past half-century. Notably, however, it appears to likewise reject *Israel's* categorical view, which is that GCIV does not prohibit *any* of its settlements, either because Article 49 doesn't apply at all or because it doesn't prohibit voluntary transfers (which presumably describes all of those in the West Bank).

It's also entirely unconvincing, not only because Pompeo failed to explain why or how certain "facts and circumstances" would or would not render a particular transfer lawful or unlawful,** but also because he (understandably) failed to offer a single reason why any of Hansell's 1978 analysis—and that of Meron, and Benvinisti, and that of virtually every other nation on the planet—was so mistaken as to be worthy of such a rare repudiation.

Perhaps Pompeo was speaking truthfully when he said that the Administration had "carefully stud[ied] all sides of the legal debate." But what did that "careful study" show? Who knows? As far as I'm aware, for example, there's no opinion from the Legal Adviser's Office that repudiates and supersedes Hansell's opinion—something the very fine and careful lawyers in that esteemed office presumably would never agree to write, because it'd be so impossible to support and defend.

Of course, it's the prerogative of the President, acting through the Secretary of State (and/or the Department of Justice, i.e., OLC) to reconsider and to change the nation's interpretation of an important treaty. To do so on the fly, however, with merely a few stray remarks, in the teeth of half a century of contrary understandings and without the slightest substantive explanation for such a profound shift, will not possibly convince anyone that the settlements are lawful, nor even that anyone in the U.S. government came up with a legal analysis that contradicted the Hansell opinion.

Then again, it's obvious that Pompeo's pronouncement of a "legal" conclusion isn't designed to convince anyone of anything, let alone of the proper reading of the Fourth Geneva Convention. Its manifest purpose is something else entirely. Whether it'll be at all effective as a matter of statecraft remains to be seen. (Color me dubious.) In the meantime, however, the Secretary's use of such an obvious and unconvincing legal figleaf in such a cavalier way must make for some dark and solemn days over at "L," as they reportedly are at Foggy Bottom more broadly.

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* Secretary Pompeo is correct that "Israeli courts have confirmed the legality of certain settlement *activities* and has concluded that others cannot be legally sustained," but those decisions were based upon legal objections other than the claim that Article 49(6) prohibits the settlement of Israeli civilians in the West Bank. Indeed, the Israeli Supreme Court has assiduously avoided reaching the merits on Article 49(6) challenges, for reasons most candidly described by Justice Goldberg in his concurrence in the 1993 *Bangil* decision.

** I suppose it's possible Pompeo had in mind hypothetical cases in which the Israeli government wasn't responsible for the movement of Israeli civilians to the West Bank. As Theodore Meron recently explained, however, "while it is true that Jewish settlers have moved voluntarily to the West Bank, this has happened only with massive state

encouragement, organization, and material and budgetary incentives, not to mention heavy security protection and increasingly the construction of bypass roads—as acknowledged by the Israeli Supreme Court in the [2005] case of *Gaza Coast Regional Council v. Knesset.*" Benvenisti likewise notes that the Israeli government has been "heavily involved in the settlements project." Indeed, as David Kretzmer explains, the movement of Israeli civilians to the West Bank was only made possible in the first instance because the Israeli government declared uncultivated rural lands to be state lands, which it then seized for purposes of settlement.

Image: A picture taken on November 19, 2019 shows a general view of the Israeli settlement of Efrat near the Palestinian city of Bethlehem south of Jerusalem, in the occupied West Bank. Photo by MENAHEM KAHANA/AFP via Getty Images

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